AS TO THE ADMISSIBILITY OF

Application No. 16514/90
by Norbert KRITSCH
against Austria

The European Commission of Human Rights sitting in private on 11 May 1992, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H. DANELIUS
Mrs. G. H. THUNE
Sir Basil HALL
Mr. F. MARTINEZ RUIZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
A.V. ALMEIDA RIBEIRO
M.P. PELLONPÄÄ
B. MARXER

Mr. H.C. KRÜGER, Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 11 December 1989 by Norbert Kritsch against Austria and registered on 26 April 1990 under file No. 16514/90;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is an Austrian citizen, born in 1952 and at present detained in prison in Vienna. He is represented by Mr. R. Soyer, a lawyer in Vienna.

The facts as agreed between the parties may be summarised as follows.

In the afternoon of 10 November 1988 the applicant and an accomplice, K., were arrested by the police on the premises of a Vienna railway station. According to the police report, information had been received about suspected drug peddlers and the two corresponded to the descriptions given. K. offered resistance and tried to reach for his pistol. He therefore had to be overwhelmed by three policemen and suffered slight injuries. Two of the policemen were likewise slightly injured but in view of the unimportance of the injuries no medical examination was effected. The applicant tried to escape but eventually stopped running when the police threatened to shoot at him. He offered passive resistance to his arrest. A third man succeeded in escaping. The police found 9.75 kgs of hashish in a bag which had been carried by K. The applicant had 88,000 and K. 10,800 AS in their possession.

On 12 November 1988 the applicant was heard as a suspect by a judge.

He stated that for more than ten years he had smoked hashish more or less regularly but that he was not an addict. He then stated that of his own free will he was prepared to confess his drug dealing in the hope of receiving a lenient sentence. He admitted that, because the turn-over of his coffee shop was insufficient resulting in a difficult financial situation, he had accepted the proposal of one W. to be supplied with hashish for resale. Partners of W. sold him successively quantities of 1-2 kgs of hashish, amounting to a total of approximately 30-35 kgs. He alleged that he did not know more about his suppliers other than their first names, and a telephone number. One of them was, so he stated, living in Milan, Italy, and spent most of his time travelling abroad. A day before his arrest he had ordered 10 kgs of hashish, his co-accused K. having found a buyer for such a quantity. The applicant also confessed to having sold hashish inter alia to his ex-wife S.K., and to E.K. and L.J. He further admitted to having tried to escape when the police surprised him and his accomplice K., but he denied having offered active resistance. The money found on him at his arrest allegedly constitued receipts from his coffee shop.

On 10 May 1989 the applicant was convicted by the Vienna Regional Court (Landesgericht) of drug peddling between July 1988 and 10 November 1988 and of an attempted sale of 9.75 kgs of hashish to one M. He was sentenced to three and a half years' imprisonment. The accomplice K. received the same punishment.

According to the judgment the applicant is a drug addict and has five previous convictions, four of them likewise related to drug offences. Both the applicant and his co-accused made full confessions after their arrest and maintained these confessions before the investigating judge. At the trial the applicant still admitted having dealt with hashish but minimized the importance of his deals. He also alleged for the first time that M. had acted as an agent provocateur and that after his arrest he had been beaten by the police and ill-treated with a plastic bag which was put over his head. The Regional Court observed in this respect that neither the co-accused at the trial nor a further co-accused who was prosecuted in separate proceedings had made similar allegations. Furthermore the applicant had maintained his confession when heard by the investigating judge three days after his arrest. Therefore his defence at the trial was not credible. The applicant's request to hear officers allegedly responsible for the agent provocateur M. was rejected on the ground that the applicant had not substantiated his allegation of having been induced to the sale of 9.75 kgs of hashish and only presumed M. was an undercover agent. His request was therefore considered to be an inadmissible attempt to have further investigations made without a concrete object of the proposed evidence (Erkundungsbeweis). In any event, so the Regional Court pointed out, the officers in question were not obliged to name an undercover agent and furthermore it was not unlawful for an undercover agent to manifest an interest in the purchase of drugs in order to obtain evidence against drug dealers. The Regional Court also based its judgment on the evidence given by witnesses E.K., S.K., H.P. and L.J., who stated to have bought hashish from the applicant.

The applicant's plea of nullity (Nichtigkeitsbeschwerde) was rejected by the Austrian Supreme Court (Oberster Gerichtshof) on 13 October 1989. Insofar as the applicant complained that when heard by the police he was not informed of his right to refuse to make any statements and that he was ill-treated, the Supreme Court observed that the alleged violations did not constitute a nullity ground. Insofar as the applicant complained that his request to obtain evidence on the supposed agent provocateur was disregarded, the Supreme Court stated that even if the applicant had been unlawfully induced to sell drugs this did not exclude his criminal responsibility.

The applicant laid criminal charges against the policemen who arrested and interrogated him. Before that investigations had already been taken up ex officio. However, having taken evidence and heard witnesses named by the applicant the Vienna Regional Court decided on 5 December 1990 to discontinue the proceedings.

The applicant also lodged an appeal (Berufung) against sentence. The appeal was rejected by the Vienna Court of Appeal (Berufungsgericht) on 4 December 1989. The Court stated that the applicant's partial confession had already been taken into account as a mitigating factor by the trial court. It further stated that there was nothing to show that the applicant was a heroin addict. In this context it is pointed out that the applicant had himself stated before the police on 12 November 1988 that he had been "clear" for eight years. He had also denied being dependent on hashish.

In view of the applicant's allegations at the trial of ill-treatment by the police, the Public Prosecution ex officio instituted criminal investigations against the officers in question. The applicant joined these proceedings as a private party (Privatbeteiligter) on 31 October 1989. Extensive investigations were carried out. Inter alia three detainees, H.St., E.W. and E.K., who had according to another detainee, W.J., been ill-treated, were heard. Contrary to the applicant's allegations, his co-accused and W.J. denied however having been ill-treated after their arrest.

On 5 December 1990 the Vienna Regional Court therefore discontinued the proceedings at the Public Prosecutor's request, on the grounds that there was insufficient evidence to prove the applicant's allegations.

COMPLAINTS

The applicant submits that his conviction of drug peddling is exclusively based on his confession made before the police. He alleges that he was not informed about his right not to make any statements or to consult a lawyer. Furthermore he was ill-treated by the police and forced to confess. He also alleges that initially he refused to supply M. with drugs as he was not at all accustomed to dealing with large quantities. He argues that if his request to take evidence on the background of his attempted deal with M. had been granted, it would have been proven that at the relevant time he acted under the influence of drugs and was not criminally responsible. In any event the intervention of an agent provocateur should have been considered as a mitigating factor. The applicant invokes Articles 3 and 6 paras. 1 and 3 (b) and (d) of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 11 December 1989 and registered on 26 April 1990.

On 6 March 1991 the Commission decided to invite the respondent Government to submit observations on the admissibility and merits of the application. After extension of the time-limit the Government's observations were sent on 6 June 1991, and the applicant's reply was received on 16 August 1991.

THE LAW

1. The applicant first complains that after his arrest he was ill-treated by the police. He invokes Article 3 (Art. 3) of the Convention which prohibits inhuman and degrading treatment.

The Government submit that in this respect the applicant has not exhausted domestic remedies. They point out that in any event criminal proceedings were instituted ex officio in consequence of these allegations but the taking of extensive evidence did not result in their confirmation. The Government further point out that in prison the applicant was corresponding with W.J. who likewise alleged that he had been ill-treated after his arrest, while no such allegation had been made by the applicant when he was heard by the investigating judge. The Government conclude that in the circumstances the applicant's allegations are clearly unfounded.

Even assuming that domestic remedies are exhausted, the Commission notes that extensive investigations carried out by the competent Austrian authorities did not confirm the applicant's allegations about ill-treatment by the police. The Commission also notes that the applicant first made these allegations at his trial several months after his arrest and has not explained why he did not raise his accusations before the investigating judge and did not at the time ask for a medical examination in order to have possible marks or injuries resulting from the alleged ill-treatment established in an official medical report.

In these circumstances the Commission cannot find any appearance of a violation of Article 3 (Art. 3) of the Convention.

2. Insofar as the applicant complains that his right to a fair trial as guaranteed by Article 6 (Art. 6) of the Convention was violated in that his conviction is exclusively based on statements which he allegedly made under duress before the police and without having been informed about his right to refuse to make any statements, the Commission refers to its above findings and notes that the applicant's allegation that he was not informed about his right to remain silent has likewise not been raised before the investigating judge although the applicant was assisted by a lawyer on the latter occasion. In the circumstances of the present case there is consequently no clear indication proving at least prima facie that at the police interrogation the applicant's rights as a suspect were disregarded. In any event the Commission observes that according to the undisputed findings in the trial court's judgment the applicant even repeated his confession before the judge who heard him three days after his arrest. Furthermore the trial court, noting that the applicant's allegations about ill-treatment by the police were not confirmed by his accomplices, found them not credible. Finally the trial court also based its findings on evidence given by witnesses E.K., S.K., H.P. and L.J. who stated that they had bought drugs from

the applicant.

In these circumstances the Commission cannot find that the applicant's conviction was exclusively based on his confession made before the police nor has it been shown that this confession was obtained by ill-treatment. Furthermore it cannot be found that the alleged omission by the police to inform the applicant of his right to make no statements and be defended by counsel affected his position in such a manner as to amount to a violation of the right to a fair trial under Article 6 (Art. 6) of the Convention.

3. Insofar as the applicant complains that the trial court refused to take evidence relating to a supposed undercover agent, the Commission observes that the right of an accused under Article 6 para. 3 (d) (Art. 6-3-d) to have witnesses examined is not absolute. It is for the national judge to decide whether or not proposed evidence is material (cf. Eur. Court H.R., Engel and Others judgement of 8 June 1976, Series A no. 22, p. 38-39, para. 91). The trial court stated that the applicant did not allege any facts indicating that the supposed under-cover agent had enticed him in an unlawful manner to sell drugs. In his submissions before the Commission the applicant has likewise in no way described his contacts with the alleged undercover agent. There is consequently nothing to show that the applicant was, in a manner incompatible with his rights under the Convention, incited by a third person for whom the respondent Government would be responsible, to procure hashish.

In these circumstances it cannot be found that the Austrian courts arbitrarily refused to take evidence in this respect. There is consequently no appearance of a violation of Article 6 (Art. 6).

It follows that all complaints have to be rejected as being manifestly ill-founded, in accordance with Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission by a majority

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)